does not have the same broad latitude to regulate commercial speech that it enjoys in regulating commercial transactions; commercial speech is not subject to mere "rational basis" review; government is not free to discriminate "at will" against commercial speech or among various classes of commercial speech.[73/]

While the commercial speech standard is less demanding than strict scrutiny, the Supreme Court has on numerous occasions employed the standard to strike down government regulation of commercial speech.[74/] Thus, the commercial

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72/ (...continued)
Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations, 98 F.C.C. 2d 1076, 1104 (1984), reconsidered, Memorandum Opinion and Order, Docket

74/ (...continued)
the National Board of Trial Advocacy); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (state may not categorically prohibit lawyers from soliciting legal business by sending

speech doctrine is a meaningful First Amendment test, which requires much the same sort of well-crafted regulation demanded by the O'Brien standard -- the standard under which the prior must-carry rules have already twice been struck down.[75]

Here, if the Commission were to impose a public interest standard on home shopping format broadcasters for purposes of determining whether they are eligible for cable carriage that differs from the standard applicable to all other broadcasters, a reviewing court would likely conclude that such action is constitutionally infirm under both prongs of the commercial speech test. First, there is no substantial interest to be served:[76] Unlike instances when

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74/ (...continued)
racially integrated community); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (ban on advertising prescription drug prices not justified by state's interest in maintaining professionalism of licensed pharmacist; commercial speech protected by First Amendment but may be regulated by time, place and manner restrictions or if false, deceptive or misleading or proposes illegal transaction); Bigelow v. Virginia, 421 U.S. 809 (1975) (paid commercial advertising in newspaper protected by First Amendment; conviction of newspaper editor for encouraging or prompting an abortion through the sale of a publication overturned).

75/ As a practical matter, the two principal components of the commercial speech test and the O'Brien test are identical. Both tests require a "substantial" governmental interest and both tests require a "narrowly tailored" fit between means and end, a fit more demanding than that required under rational basis review, but less demanding than required under strict scrutiny.

76/ Government bears the burden of proving that the commercial speech regulation it has imposed is justified, (continued...)

commercial speech regulations have been upheld because the interests sought to be served have been found substantial,

satisfies all of their obligations as public trustees.[78] To nevertheless deny them eligibility for must carry based on their commercial speech would sweep too broadly, punishing both commercial speech and noncommercial speech, including such core First Amendment activity as news presentations and public interest programming.

Most fundamentally, a decision by the Commission that home shopping format broadcasters are not operating in the public interest because of their commercial programming would underestimate dramatically both the constitutional protection for and public interest in SKC's commercial programming. The free flow of commercial information is guaranteed by the First Amendment and is of vital interest to local and national economies.[79] For many Americans, commercial speech is every bit as relevant -- if not more relevant -- than most other entertainment programming available on broadcast and cable channels. During oral argument in the Discovery Network case decided just last week and discussed above,[80] Supreme Court Justice Antonin Scalia illustrated the significance of commercial speech to the daily lives of Americans when he queried: "'Why do you

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78/ SKC Comments, at 18-37.

79/ "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." Central Hudson Gas, 447 U.S. at 561-62.

80/ See discussion supra pp. 28-31.

pick on commercial speech?' When I think back to the important decisions in my life, buying a house was one of the most important.'"[81/] Indeed, he acknowledged that for himself and other home buyers real estate advertising was "'much more important than the war in Bosnia.'"[82/] At a time in American life in which a revival of entrepreneurial enterprise is a core national concern, this agency should not treat it as beneath the dignity of the First Amendment.

81/ Linda Greenhouse, Supreme Court Roundup; Justices Examine Limits on Commercial Speech, N.Y. Times, Nov. 10, 1992, at A-19 (quoting statement of Justice Antonin Scalia during oral argument in City of Cincinnati v. Discovery Network, Inc., No. 91-1200 (U.S. March 24, 1993).

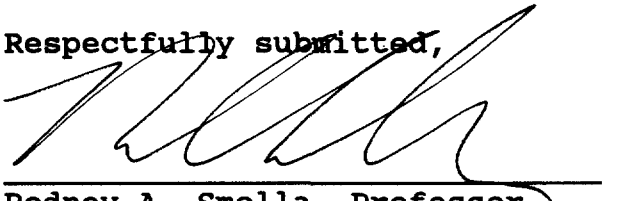
82/ Id.

III. CONCLUSION

In this unprecedented proceeding, Congress has directed the Commission to determine whether home shopping format stations as a class are operating in the public interest, convenience and necessity, notwithstanding the Commission's numerous prior determinations that home shopping format stations individually are serving the public interest. The consequences of a decision that such stations are not operating in the public interest could be dire for approximately 100 broadcasters -- at a minimum excluding

on the content of speech alone. Government action that discriminates against one class of speakers based on the content of their speech is per se unconstitutional. Similarly, the Commission cannot conclude that home shopping format broadcasters are operating in the public interest for the purpose of licensing but not for the purpose of eligibility for must carry because such a determination would create a distinction in the application of the well-established public interest standard based on the content of one class of broadcasters' speech. Thus, the only conclusion the Commission constitutionally can reach in this proceeding is that home shopping format broadcasters are operating in the public interest, convenience and necessity and, therefore, are entitled to eligibility for must carry. Given the substantial record evidence that home shopping format stations are fulfilling their public interest obligations, this conclusion is not only permitted but, indeed, compelled.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

This will certify that an original and nine copies of the foregoing Statement of Rodney A. Smolla in Support of the Comments of Silver King Communications, Inc., were delivered by hand this 29th day of March, 1993, to the following:

Office of the Secretary
Federal Communications Commission
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Robin H. Sangston